Supreme Court, U.S.
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No. —— 00 341

IN THE

Supreme Court of the United States

GILES H. DUNN and GAIL W. DUNN,
Petitioners,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the principle of reasonable investment backed expectation should apply to the Petitioners, who acquired their property by inheritance.

2. Whether the Petitioners can be deprived of a trial by jury in a claim made under the State Declaratory Judgment Act.

3. Whether the Petitioners can be denied just compensation, when the proposed use of their property would not create a public nuisance.

LIST OF PARTIES

The Petitioners are Giles H. Dunn and Gail W. Dunn.

The Respondent is The Commonwealth of Massachusetts, Executive Office of Environmental Affairs, Department of Environmental Protection.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	6
I. THE PRINCIPLE OF REASONABLE INVESTMENT BACKED EXPECTATION SHOULD NOT APPLY TO LANDOWNERS WHO ACQUIRED TITLE BY INHERITANCE	6
II. LANDOWNERS SHOULD NOT BE DEPRIVED OF A TRIAL BY JURY IN A CLAIM FOR INVERSE CONDEMNATION, WHICH CLAIM WAS MADE UNDER THE STATE DECLARATORY JUDGMENT ACT	8
III. THE RESPONDENT HAS THE BURDEN TO PROVE THAT THE PROPOSED CONSTRUCTION WOULD CREATE A NUISANCE	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases — Page

Attorney General v. Colleton, 387 Mass. 790, 795-796 (1982) 11

Commonwealth v. Johnson, 417 Mass. 498, 501 (1994) 11

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992) 7, 9, 10, 12

Monterey v. Del Monte Dunes, 119 S.Ct. 1624 (1999) 8, 9, 12

Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) 7

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136 (1978) 6, 12

United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 851 (1974) 6

Constitutions and Statutes

Article X—Declaration of Rights Of the Inhabitants of the Commonwealth of Massachusetts ... 2, 10

United States Constitution, Fifth Amendment 2

United States Constitution, Seventh Amendment 2, 12

United States Constitution, Fourteenth Amendment 2

28 U.S.C. § 1257 1

42 U.S.C. § 1983 ..... 2, 9

General Laws of Massachusetts, Chapter 131, Section 40 ..... 3, 4, 5

General Laws of Massachusetts, Chapter 231A, Section 1 ..... 3, 9

Miscellaneous Authorities

Anderson, Declaratory Judgments, West Publishing 1940, p. 502 8

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari issue to review the Memorandum and Order of the Appeals Court of the Commonwealth of Massachusetts entered March 27, 2000, and the denial of the Petitioners' Application for Further Appellate Review by the Supreme Judicial Court of the Commonwealth of Massachusetts dated June 2, 2000.

OPINIONS BELOW

On June 2, 2000, the Supreme Judicial Court denied an application for further appellate review (App. 1a) of the unreported memorandum and order of the Appeals Court of the Commonwealth of Massachusetts (App. 13a), affirming the judgment of the Superior Court for the County of Suffolk, which was also unreported but is set forth in the appendix, at App. 3a.

JURISDICTION

The jurisdiction of this Court to review the June 2, 2000, Order of the Supreme Judicial Court of the Commonwealth of Massachusetts denying the Petitioners' Application for Further Appellate Review is invoked under 28 U.S.C. § 1257, which provides as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute or the United States is drawn in question or where the validity of a statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. . . .

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use without just compensation."

The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Article X of the Massachusetts Constitution provides, in pertinent part:

> "but *no part* of the property of any individual, can, with justice, be taken from him, or applied to public uses, without his own consent . . . . And whenever the public exigencies require that the property of any individual should be appropriated to public use, he shall receive a reasonable compensation therefor. (Emphasis supplied).

Massachusetts has adopted the Uniform Declaratory Judgment Act and it is cited in The General Laws of Massachusetts as c. 231A (App. 45a).

The General Laws of Massachusetts, c. 131, § 40, in pertinent part, provides:

> No person shall remove, fill, dredge or alter any bank, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding, ...

STATEMENT OF THE CASE

The Petitioners are the owners of a lot of land containing 1.106 acres (App. 29a), abutting Fresh Pond Cove which is part of Buzzard's Bay located in the southeasterly part of Massachusetts (App. 28a, 29a, 51a).

Immediately to the rear of the Petitioners' lot is a body of fresh water known as Fresh Pond. Thus, the Petitioners' land is located between Fresh Pond and Fresh Pond Cove and is a coastal dune and barrier beach (App. 29a). There are houses located immediately adjacent to the Petitioners' land on the barrier beach/coastal dune between Fresh Pond and Fresh Pond Cove (App. 47a, 49a, 50a)

The locus is located on Connett Point and all of Connett Point was owned by the Dunn family from at least the beginning of the century and was subdivided in 1936 (App. 25a, 28a).

The Petitioner, Giles H. Dunn, became the owner of the locus when he inherited it from his mother in 1985 and in 1986 conveyed it to himself and his wife (App. 28a).

The Petitioners also own a lot which is occupied by a building similar to the building proposed by the Petitioners (App. 50a).

The Petitioners' land and the type of the proposed construction are also depicted on the photographs (App. 47a, 49a, 50a).

The Petitioners propose to construct a single family house on their property, similar to the houses shown on the photographs. The house would be elevated on pilings and serviced by a septic system, which could be located on the dune, similar in kind to the adjacent homes (App. 23a). The use is permitted by the Town of Mattapoisett's Zoning By-Law (App. 28a).

The Petitioners had entered into a purchase and sale agreement to sell the property (App. 17a, 42a-43a). The Petitioners did receive a permit to construct the building pursuant to the wetlands statute, but an appeal was filed by the Respondent and a Superseding Order of Conditions was issued (App. 17a-18a). The Petitioners lost the sale because they were unable to obtain a building permit as required by the purchase and sale agreement (App. 42a).

The Petitioners, subsequent to the denial of an Order of Conditions, filed a Complaint/Petition (App. 16a-21a) with the Superior Court seeking three separate forms of relief: (1) as allowed by the Massachusetts statutes, General Laws, c. 131, that the Court make a determination that the action of the Respondent was not justified and issue an order allowing the construction of the building (App. 20a); (2) as allowed by the Massachusetts Declaratory Judgment Act, that the Court make a binding determination that there was a temporary taking of the Petitioners' property (App. 20a); and (3) as

allowed by the Massachusetts Declaratory Judgment Act, that the Court make a binding declaration that the Petitioners were deprived of the use of their property and assess damages as required by the United States Constitution and the Constitution of Massachusetts (App. 20a). The Petitioners also demanded a trial by jury on all issues (App. 20a).

The matter was heard by the Superior Court on the Petitioners' Motion for Judgment on the Pleadings as to the first request for relief, that is, the issuance of an order allowing the construction of the building. The Superior Court remanded the matter to the Respondent for a hearing on the Petitioners' variance request and "to ascertain exactly the uses to which *the land* may lawfully be put." (emphasis added). (App. 4a, 22a). In response to the order of the Superior Court, a finding was made that as a matter of zoning the project proposed by the Petitioners was permissible, subject to the uses which would be permitted by the Massachusetts Wetlands Act which are set forth as non-structural and structural uses (App. 6a, 29a, 30a, 37a). The motion was denied and the Court entered a judgment affirming the decision of the Respondent (App. 3a-7a). There was no decision as to the two remaining claims for relief contained in the Petitioners' Complaint.

The Appeals Court entered a decision affirming the judgment of the lower court (App. 13a-14a).

An Application for Further Appellate Review was filed with the Supreme Judicial Court and was denied (App. 1a).

The loss of the use of the Petitioners' property without just compensation was initially asserted by the Petitioners at the time of the filing of the Complaint (App. 16a-21a) and was also asserted at the Appeals Court and the Supreme Judicial Court levels (App. 13a).

REASONS FOR GRANTING THE PETITION

I. THE PRINCIPLE OF REASONABLE INVESTMENT BACKED EXPECTATION SHOULD NOT APPLY TO LANDOWNERS WHO ACQUIRED TITLE BY INHERITANCE.

The Petitioners in the matter before this Court inherited the property after the regulation was enacted (App. 29a).

The first time that reasonable investment backed investment was declared to be the law to be applied in claims for inverse condemnation was in the case of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978).

> So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment.

Investment backed expectation was not defined in the *Penn Central* case. However, investment contract was defined in the case of *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 851 (1974), in which it was stated that you must examine the economic realities of the transaction rather than the names that may have been employed by the parties and as to whether the ownership of the property involved an investment of money in a common enterprise with profits to come solely from the efforts of others.

The Petitioners were never involved in the investment of money in a common enterprise. They acquired the property from their ancestors.

The principle of reasonable investment backed expectation should not apply to the Petitioners, who inherited the property. The Petitioners were not entrepreneurial in acquiring the property, as was stated in *Penn Central, supra*, nor did

they intend to profit from the land and obtain a "reasonable return" on their investment because the obvious fact of the matter is that the Petitioners never made an investment.

To allow the principle of reasonable investment backed expectation to be applied to inheritors of property is a punishment based solely on heritage. The Petitioners are entitled to be justly compensated for the loss of the use of their land in an amount to be determined by a jury.

It should be noted that in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-1028 (1992), reference was made to the principle of reasonable investment backed expectation as it relates to the ownership of personal property.

> And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least of the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

The Appeals Court erred when it stated that the claim of the Petitioners fails because the Wetlands Protection Act was in existence before the Petitioners acquired title to the property and that their property rights consequently were limited by the Act when they acquired title (App. 13a).

This Court ruled in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to

> implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

The application of the principle of reasonable investment backed expectation should not be allowed to deprive the Petitioners of any property rights given to the Petitioners by the United States Constitution. That principle is not and should not be applicable to the inheritors of land.

II. LANDOWNERS SHOULD NOT BE DEPRIVED OF A TRIAL BY JURY IN A CLAIM FOR INVERSE CONDEMNATION, WHICH CLAIM WAS MADE UNDER THE STATE DECLARATORY JUDGMENT ACT.

> The right to trial by jury was obtained at a price so great in blood, battle, and sacrifice, that the common-law systems of jurisprudence jealously guards against the least encroachment thereon, and is ever ready to stay the hand that seeks, by any sort of subterfuge, to trench upon that sacred right. It takes more than a colorable attempt to have the proceeding parade as an equitable one to destroy this heritage of the common law. *Anderson, Declaratory Judgments*, West Publishing 1940, p. 502.

The United States Supreme Court has decided, in the case of *Monterey v. Del Monte Dunes*, 119 S.Ct. 1624 (1999), that a landowner has the right to a trial by jury on inverse condemnation cases. In that case, that right was claimed when a suit was brought under 42 U.S.C. §1983.

The Petitioners in this case are seeking the right to a trial by jury as set forth in the State Declaratory Judgment Act for a "constitutional tort".

In *Monterey, supra*, at 1644, the Court did not address the jury's role in an ordinary inverse condemnation suit. The

Commonwealth of Massachusetts does not have, as the State of California does have, "a facially adequate procedure for obtaining just compensation for temporary takings such as this one."

In this case, as in *Monterey, supra*, at 1644, there is no "broad challenge to the constitutionality of the [state's] general land-use ordinances or policies, ... "

In *Monterey, supra*, at 1648, this court stated: "This Court has long assumed that . . . actions for damages to a person or property . . . are actions at law triable to a jury."

The Massachusetts Declaratory Judgment Act, General Laws of Massachusetts, c. 231A, § 1, specifically reserves to the Petitioners, "the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, ..."

The Massachusetts Declaratory Judgment Act is very specific as to the right to a trial by jury. There is no mention in § 1983 of 42 U.S.C. of the right to a jury trial as there is in the Massachusetts Declaratory Judgment Act.

By the action of the Massachusetts Courts, the Petitioners were deprived of the right to have all of the factual issues determined by a jury, including the issue of whether or not the action of the Respondent deprived the Petitioners of substantially all of the economic use of their property as was stated in *Lucas, supra*, at 2893:

> The oft-cited maxim that, while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . In 70 odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to engage in . . . essentially ad hoc, *factual* inquiries. (Emphasis supplied).

III. THE RESPONDENT HAS THE BURDEN TO PROVE THAT THE PROPOSED CONSTRUCTION WOULD CREATE A NUISANCE.

To determine whether a taking was made of the Petitioners' property as a result of the enactment of the regulation, the Respondent is required to prove that the erection of the proposed house by the Petitioners would be subject to a common law action for public nuisance. See *Lucas v. South Carolina Coastal Council, supra*, at 1031.

> Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.

There was no finding by the lower court that the construction of the house would create a nuisance, nor did the Respondent, upon whom the burden of proof has been placed by the *Lucas* case, prove that the construction of the house would create a nuisance. If it cannot be proven that the construction of the house would create a nuisance, then the Petitioners should receive compensation as allowed by the United States Constitution or Article X of the Declaration of Rights of the Massachusetts Constitution, or both.

There is a difference between the rights granted to the Petitioners under the Fifth Amendment of the United States Constitution and Article X of the Massachusetts Constitution, adopted in 1780.

The Massachusetts Constitution states that "no part" of the property of any individual can be taken without his consent, unless he receives a reasonable compensation therefor. The Constitution of four other states has similar requirements:

Pennsylvania, Article VIII (1776), Delaware, Section 10 (1776), Vermont, Article IX (1777), and New Hampshire, Article XII, (1784).

The phrase "no part" does apply to the bundle of rights owned by the Petitioners, rather than the requirement under the United States Constitution that the Petitioners must be deprived of substantially all of the economically beneficial use of their property.

In the case *Commonwealth v. Johnson*, 417 Mass. 498, 501 (1994), the Massachusetts Supreme Judicial Court stated: "Words of the Constitution cannot be ignored as meaningless since all of the words of the Constitution must be presumed to have meaning."

Additionally, the Massachusetts Supreme Judicial Court has stated that that Massachusetts Constitution can be interpreted more broadly than the Constitution of the United States. See *Attorney General v. Colleton*, 387 Mass. 790, 795-796 (1982).

> The phraseology of the Massachusetts Constitution, however, is different from that of the Fifth Amendment. . . . This Court has expressly observed that, when interpreting the Massachusetts Constitution, we are not bound by Federal decisions which are less restrictive in some aspects than our Declaration of Rights. [citation omitted]. In fact, on occasion we have exercised our prerogative to interpret our Constitution more broadly. The United States Supreme Court has recognized that 'a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.' (emphasis in original). *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

Accordingly, the Massachusetts Constitution and four other states, more than 200 years ago, did take into consideration what is commonly referred to as the bundle of property rights.

The common law property principle that there is a group of rights inhering in the citizen's ownership of property, is stated in the case of *Penn Cent. Transp. Co., supra*, p. 142.

> . . . has frequently emphasized the entire 'group of rights inhering in the citizen's [ownership'. *United States v. General Motors Corp.*, 323 U.S. 373 (1945). The term is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the *group of rights* inhering in the citizen's relation to the physical thing, *as the right to possess, use and dispose of it*. . . . The constitutional provision is addressed to *every sort of interest* the citizen may possess.' *Id.*, at 377-378 (emphasis added).

The Petitioners should be either allowed to construct a house similar in kind to those depicted in the photographs (App. 47a, 49a. 50a) in accordance with the *Lucas* decision, or be allowed to prove their damages in the taking of their property before a jury of their peers, as required by the United States Constitution, in accordance with the *Monterey* decision.

CONCLUSION

For all of the reasons presented herein, this petition for a writ of certiorari should be granted.

The decisions of the Massachusetts Courts do not comply with just compensation clause of the United States Constitution, do not coincide with the Seventh Amendment of the United States Constitution require trials by jury, and are in direct conflict with the decisions of this Court, in particular, the *Lucas* and Monterey decisions.

Respectfully submitted:

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Counsel for Petitioners

August 30, 2000

APPENDIX A

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Nicholas J. Decoulos, Esquire
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Peabody, MA 01960

RE: Docket No. FAR-11273

GILES H. DUNN & another

vs.

EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied.

Susan Mellen, Clerk

Dated: June 2, 2000

To: Nicholas J. Decoulos, Esquire
Edwards G. Bohlen, A.A.G.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT CIVIL ACTION

No. 96-5579

GILES H. DUNN, *et al.*,
Plaintiffs

v.

EXECUTIVE OFFICE OF ENVIRONMENTAL, AFFAIRS,
Defendant

JUDGMENT FOR DEFENDANT[S] AFTER RESCRIPT
(PURSUANT TO MASS.R.A.P. 28)

This action was appealed to the - Appeals Court - the issues having been duly heard and the Appeals Court having duly issued a rescript, it is ordered and adjudged:

Judgment Affirmed. The Complaint of the plaintiffs is dismissed.

Dated at Boston, Massachusetts, this ninth day of June, 2000.

MICHAEL JOSEPH DONOVAN,
Clerk/Magistrate

By /s/ Judith Trocki
JUDITH TROCKI
Asst Clerk

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT CIVIL ACTION

NO. 96-05579C

GILES H. DUNN and GAIL W. DUNN,
Plaintiffs,

vs.

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendant.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiffs, Giles H. Dunn and Gail W. Dunn (the "Dunns"), filed this action under G.L. c. 30A, § 14(7) seeking judicial review of the defendant's, Department of Environmental Protection (the "DEP"), denial of a wetlands permit. The matter is now before this Court on the Dunns' motion for judgment on the pleadings. For the reasons stated below, the motion is *DENIED*.

BACKGROUND AND PROCEDURAL HISTORY

The Dunns own a beachfront property at Point Connett in Mattapoisett, Massachusetts (the "Property"). On that Property, the Dunns propose to build a house on pilings with an associated subsurface sewage disposal system, driveway and parking area in an area classified under the Wetlands

Protection Regulations as coastal dune and barrier beach. On September 10, 1996, the DEP denied the Dunns' proposed project, following an adjudicatory hearing. After hearing the testimony of experts, the DEP inter *alia* determined that the coastal dune at the project site was significant to storm damage prevention and flood control. It found that the proposed driveway and parking area would harden the dune and impede the ability of the waves to remove the sand from it, and in addition would destabilize the dune and generate increased erosion by removing existing vegetation, mostly mature trees and brush on the back dune. The DEP also concluded that the wetlands permit should be denied because it did not meet the performance standards for work on a coastal dune that are set forth in the Wetlands Protection Regulations, see 310 CMR 10.28(3)

In their complaint, the Dunns challenge the permit denial as a taking under the Fifth Amendment to the United States Constitution and Article X of the Massachusetts Declaration of Rights.

While this action was pending, the Dunns had, in August 1994, applied to the DEP for a wetlands variance allowing the same project. On February 28, 1997, after the Dunns had commenced this action, the DEP issued a decision denying the variance. The Dunns neither requested an adjudicatory hearing on the variance denial nor appealed it under G.L. c. 30A.

Superior Court Judge Carol Ball remanded this matter to the DEP for a hearing on the Dunns' variance request and "to ascertain exactly the uses to which the land may lawfully be put." On remand the DEP issued a decision that the uses to which the land may lawfully be put, as a matter of zoning, are the project proposed by the Dunns and the uses identified as following:

(1) Nonstructural uses: leisure and recreational activities, i.e., sunbathing, swimming, boating, picnicking and birdwatching; the sale or lease of beach rights to individuals such as inland residents who have no beach access; charring the public access fee to use the beach for recreation, selling the parcel to abutting owners; and use of the parcel by its owners for private recreational enjoyment.

(2) Structural uses: any uses which do not require the installation of an on—site septic system on lot 161A but might include a chemical toilet, including beach cabanas, boat storage or other marine related uses, or an open deck and seating area which could also serve as a tent platform; and a small permanent structure elevated on piles and built in accordance with the State Building Code and FEMA structural requirements for coastal high hazard areas located near the western end of the lot and forward of the mature woody vegetation, provided it was of open—pile construction, without continuous concrete footing or slab and minimized impacts to vegetation from shading and destruction; and

(3) For either structural and nonstructural uses: a short driveway without turnaround circumference or a parking space at the western property line to minimize dune impacts, so long as it was constructed of pervious material (i.e., crushed stone or shells) and be no larger than necessary to accommodate one vehicle.

See *In the Matter of Giles H. Dunn and Gail W. Dunn*, December 17, 1997, Docket No. 89-072R, Variance, Mattapoisett at 10-11.

DISCUSSION

A court can review and either affirm, reverse, remand, compel action, or modify a state administrative agency's decision if the court determines " that the substantial rights of

any party may have been prejudiced because the agency decision is:

(a) In violation of constitutional provisions; or

(b) In excess of the statutory authority or jurisdiction of the agency; or

(c) Based upon an error of law; or

(d) Made upon unlawful procedure; or

(e) Unsupported by substantial evidence; or

(f) Unwarranted by facts found by the court on the record; or

(g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

The court shall make the foregoing determinations upon consideration of the entire record, or such portions of the record as may be cited by the parties. The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G.L. c. 30A, § 14(7).

The Dunns contend that, by denying the wetlands permit, the DEP has effected a regulatory taking of their property under the Fifth Amendment to the United States Constitution and Article X of the Massachusetts Constitution.[1]

---

[1] In considering whether economic regulations satisfy due process, the Supreme Judicial Court has not established substantially different standards under the Commonwealth's Constitution than the Supreme Court has established under the Constitution of the United States, see *Steinbergh v. Cambridge*, 413 Mass 736, 738 (1992), and this Court will maintain that status in deciding this case. This Court's discussion will focus on the claimed violations of the Constitution of the United States.

"As provided by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027, 1029 (1992), if the application of the wetlands by—law deprived the plaintiffs of all economically beneficial use of their property, as per se taking would have been effected,[] unless certain exception obtain. *See Lopes v. Peabody*, 417 Mass. 299, 303 (1994). If however, the regulation has resulted in less than a total loss of the economic value of the plaintiffs' property, the question as to whether there has been a regulatory taking must be analyzed under pre-*Lucas* principles, viz., (i) the validity of the by-law as applied to the plaintiffs' property; (ii) the plaintiffs' reasonable investment-backed expectations; (iii) the economic impact on the plaintiffs' property; and (iv) the character of the governmental action. *Lopes v. Peabody*, supra at 304. *Leonard v. Brimfield*, 423 Mass. 152, 154 (1996)." *FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone*, 41 Mass. App. Ct. 681, 688 (1996).

The record indicates that the Dunns have failed to carry their burden of showing that the regulation deprives them "of all economically viable use of the land." The Final Decision concerning the variance application does enumerate several uses of the Property. The Dunns have also not shown on this record that the Property was acquired before the Wetlands Protection Act (and the regulations thereunder) restricted development on coastal dunes and barrier beaches. The record does not show that the Dunns' expectation for the Property was backed by investment.

Absent any showing of a constitutional violation, the Court concludes that the DEP's denial of the wetlands permit was justified. Therefore, the decision of the administrative agency is affirmed.

ORDER

It is therefore *ORDERED* that judgment enter *AFFIRMING* the decision of the Department of Environmental Protection in upholding the Order of Conditions denying a wetlands permit to the Dunns.

REGINA L. QUINLAN
Justice of the Superior Court

DATE: July 14, 1998

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

NO. 96-5579-C

GILES H. DUNN AND GAIL W. DUNN,
Plaintiffs

v.

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendant

PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given that GILES H. DUNN AND GAIL W. DUNN, the above-named plaintiffs, hereby appeal to the Appeals Court from the Memorandum of Decision and Order on Plaintiffs' Motion for Judgment on the Pleadings entered in this action on July 14, 1998.

Nicholas J. Decoulos
BBO #117760
DECOULOS & DECOULOS
Attorney for Plaintiffs
248 Andover Street
Peabody, MA 01960
Tel. 978/532-1020
August 11, 1998

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
CIVIL ACTION

No. 96-5579

GILES H. DUNN AND GAIL W. DUNN
Plaintiffs

v.

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS,
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Defendant

JUDGMENT ON FINDINGS BY THE COURT

THIS ACTION CANE ON FOR HEARING BEFORE THE COURT, QUINLIN, J., PRESIDING, AND THE ISSUES HAVING BEEN DULY HEARD AND FINDINGS HAVING BEEN DULY RENDERED: IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1. THAT THE DECISION OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION IN UP-HOLDING THE ORDER CONDITIONS DENYING THE WETLANDS PERMIT OF THE DUNNS IS AFFIRMED.
2. THE COMPLAINT OF THE PLAINTIFFS IS DISMISSED.

DATED AT BOSTON, MASSACHUSETTS, THIS 12th DAY OF AUGUST, 1998.

MICHAEL JOSEPH DONOVAN,
CLERK/MAGISTRATE

By /s/ James J. O'Reilly
JAMES J. O'REILLY
Assistant clerk

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

No. 96-5579-C

GILES H. DUNN AND GAIL W. DUNN,
Plaintiffs

v.

THE COMMONWEALTH OF MASSACHUSETTS EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendant

PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given that GILES H. DUNN AND GAIL W. DUNN, the above-named plaintiffs, hereby appeal to the Appeals Court from the Judgment on Findings by the Court entered in this action on August 13, 1998.

Nicholas J. Decoulos
BBO #117760
DECOULOS & DECOULOS
Attorney for Plaintiffs
248 Andover Street
Peabody, MA 01960
Tel. 978/532-1020
August 17, 1998

APPENDIX G

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

98-P-1925

GILES H. DUNN & another[1]

vs.

EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

The Dunns appeal from a decision of the Superior Court upholding the Department of Environmental Protection's denial of their proposal to construct a single family dwelling with a septic system on a barrier beach coastal dune. The Dunns maintain that this project denial constitutes a regulatory taking. Substantially for the reasons cited by the judge and in the Department's brief, we affirm. For the reasons set forth in the Department's brief, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), on which the Dunns rely, is unavailing. Further, even if, as the Dunns argue, art. X of the Declaration of Rights of the Massachusetts Constitution may be interpreted to provide greater property rights than the United States Constitution, a matter which we need not decide, the argument nonetheless fails because (i) the Wetlands Protection Act was in existence before the Dunns acquired title to the property at issue and the Dunns' property rights consequently were limited by the Act when they acquired title and (ii) the Dunns point-to no

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[1] Gail W. Dunn.

credible evidence to support their assertions of "significant" diminution in value. The Dunns have failed to prove that they are entitled to compensation for a regulatory taking under the Declaration of Rights.

Judgment affirmed.

By the Court (Kass, Greenberg, & Lenk, JJ.),

/s/ Ashley Ahearn
ASHLEY AHEARN
Clerk

Entered: March 27, 2000.

APPENDIX H

COMMONWEALTH OF MASSACHUSETTS
Appeals Court for the Commonwealth
At Boston,

In the case no. 98-P-1925

GILES H. DUNN & another

vs.

EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS

Pending in the Superior_____
Court for the County of Suffolk_____

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court,

/s/ Ashley Ahearn,
ASHLEY AHEARN
Clerk

Date March 27, 2000.

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

No.

GILES H. DUNN AND GAIL W. DUNN,
Plaintiffs

v.

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendant

VERIFIED COMPLAINT AND JURY CLAIM

INTRODUCTION

This is a petition for judicial review as allowed by *General Laws*, Chapter 30A, Section 14, of a decision of the defendant, Department of Environmental Protection, a copy of which is attached hereto as Appendix 1, and a request for declaratory judgment against the Defendant.

JURISDICTION

The Superior Court has been granted jurisdiction to review decisions of administrative agencies of the Commonwealth of Massachusetts in *General Laws*, Chapter 30A, Section 14.

The Superior Court has jurisdiction pursuant to Chapter 231A to make binding determinations and assess damages.

PARTIES

1. The Plaintiffs are Giles H. Dunn and Gail W. Dunn, who reside at 84 Angelica Avenue, Mattapoisett, Plymouth County, Massachusetts.

2. The Defendant, the Commonwealth of Massachusetts, Executive Office of Environmental Affairs, Department of Environmental Protection, is an agency of the Commonwealth of Massachusetts, with offices at 1 Winter Street, Boston, Suffolk County, Massachusetts.

ALLEGATIONS OF FACT COMMON TO ALL COUNTS AND CAUSES OF ACTION

3. The Plaintiffs are the owners of a parcel of real estate on Beach Road in Mattapoisett, Massachusetts, shown as Lot 1, containing 48,195 square feet, on a plan entitled "Plan of Land in Mattapoisett, MA, Prepared for Giles H. Dunn, May 18, 1988, Scale 1"=100', Arthur C. Thompson, Inc., Engineers & Surveyors, Marion, MA", which plan has received an endorsement from the Mattapoisett Planning Board on July 19, 1988, "Approval Under Subdivision Control Law Not Required", to which plan reference may be made for a more particular description (the Property).

4. On or about September 28, 1988, a Notice of Intent was filed to build on the Property, which notice was filed by William J. Sweeney who intended to purchase the Property from the Plaintiffs in order to construct a single family cottage on the Property.

5. After an Order of Conditions was issued by the Mattapoisett Conservation Commission, the Defendant filed an appeal from the Order of Conditions and a Superseding Order of Conditions denying the project was issued by the Defendant on March 22, 1989.

6. An appeal was filed by Sweeney on the Superseding Order of Conditions and thereafter the Plaintiffs were substituted as the applicants.

7. A hearing was conducted by an administrative law judge of the Department of Environmental Protection and a final decision dated September 10, 1996, was issued which approved the Defendant's denial of the Order of Conditions.

8. The Plaintiffs are aggrieved by the final decision of the Defendant, whereby it was stated that the project does not meet the performance standard for work in a coastal dune.

9. As a result of the appeal by the Defendant and affirmation of the Superseding Order of Conditions, the Plaintiffs cannot beneficially use the Property for any practical purpose. Their use is limited to bird watching, looking at the water, simple pride of ownership, protecting a view, providing a view, flying a kite and as a topic of conversation.

10. The Plaintiffs, having been denied the right to use the Property in a manner similar to other property in the immediate area, have been and are being deprived of their property rights as granted to them by U.S. Constitution and the Constitution of Massachusetts.

11. From the time that the Plaintiffs owned the Property and at all times thereafter, it was the Plaintiffs' investment-backed expectation that the Property was to be used for a single residential house lot.

12. The work proposed by the Plaintiffs will not affect public health, safety and welfare, and is not significant to any public or private water supply, to the ground water supply, to flood control, to flood damage prevention, to prevention of pollution, to protection of land containing shell fish, to the protection of wildlife habitat or to the protection of fisheries.

13. The Defendant's decision is in violation of the U.S. Constitution and the Massachusetts Constitution, is in excess of statutory authority or jurisdiction of the Defendant, is based upon an error of law, is made upon unlawful procedure, is unsupported by substantial evidence, is unwarranted by the facts, is arbitrary, capricious, an abuse of discretion and was not made in accordance with the law.

14. The acts of the Defendant amounted to an improper and unreasonable delay in the adjudicatory hearing on the appeal made by the Defendant from the Town of Mattapoisett Conservation Commission.

15. For the reasons set forth above an actual controversy exists between the Plaintiffs and the Defendant regarding their reasonable rights and duties under the U.S. Constitution, the Constitution of Massachusetts and the statutes of Massachusetts.

16. Unless granted the relief sought herein, the Plaintiffs will suffer irreparable damages as a result of their inability to actively use the Property or construct a single residential dwelling thereon, the prevention of which they have no adequate legal remedy.

CAUSE OF ACTION

17. The decision of the Defendant has prejudiced the substantial rights of the Plaintiffs and the decision is in violation of Chapter 30A, Section 14 (7) (a) - (g).

18. The delays in making the decision and the decision of the Defendant have deprived the Plaintiffs of their substantial rights granted to them by the U.S. Constitution and the Constitution of Massachusetts and as a result thereof, the Property has been inversely condemned, both temporarily and permanently, and the Plaintiffs have suffered damages by the condemnation of the Property.

REOUEST FOR RELIEF

WHEREFORE, the Plaintiffs request that:

1. This Honorable Court conduct a hearing on the merits of the Complaint, receive additional evidence, and make a determination that the action of the Defendant was not justified, set aside the decision of the Defendant and affirm the Order of Conditions issued by the Town of Mattapoisett Conservation Commission.

2. The Court make a binding determination that during the period of time that the Plaintiffs were unable to use the Property as they anticipated, there was a temporary taking of the Property and the Plaintiffs be awarded damages for the loss of the use of the Property, including real estate taxes and other costs incurred during the period of the temporary taking.

3. If the Court affirms the decision of the Defendant, that the Court make a binding declaration that the Plaintiffs are being deprived of all economically beneficial use of the Property and their reasonable investment—backed expectation, and the Court assess damages as required by the U.S. Constitution and the Constitution of Massachusetts.

JURY CLAIM

THE PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES.

/s/ Nicholas J. Decoulos
NICHOLAS J. DECOULOS
BBO #117760
DECOULOS & DECOLOUS
Attorney for Plaintiff
248 Andover Street
Peabody, MA 01960
Tel. (508) 532-1020
October 4, 1996

We, Giles H. Dunn and Gail W. Dunn, do hereby state under the penalties of perjury that we are the Plaintiffs named and described in the foregoing Complaint; that we have read the contents thereof and as to all matters of fact therein stated the same is true and as to all matters therein stated on information and belief, we believe them to be true.

/s/ Giles H. Dunn
GILES H. DUNN

/s/ Gail W. Dunn
GAIL W. DUNN

APPENDIX J

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON MA 02108
(617) 292-5500

ARGEO PAUL CELLUCCI
Governor

TRUDY COXE
Secretary

DAVID B. STRUHS
Commissioner

December 17, 1997

Docket No. 89-072R
Variance
Mattapoisett

In The Matter Of:
GILES H. DUNN and GAIL W. DUNN

FINAL DECISION

MARK L. SILVERSTEIN, *Administrative Law Judge.*

Background and Procedural History

This proceeding was remanded by the Suffolk Superior Court in an order it issued on May 14, 1997 ("the remand order"). The Court has pending before it a proceeding for judicial review brought by Giles H. Dunn and Gail W. Dunn pursuant to M.G.L. c. 30A, §14(7), in which they challenge the Department's denial of a wetlands permit for residential

construction they propose to carry out on beachfront property at Point Connett in Mattapoisett. The Dunns propose to build a house on pilings with an associated subsurface sewage disposal system, driveway and parking area in an area classified under the Wetlands Protection Regulations as coastal dune and barrier beach. The Department denied the Dunns' proposed project, following an adjudicatory hearing, because it did not meet the performance standards for work on a coastal dune that are set forth in the Wetlands Protection Regulations, *see* 310 CMR 10.28(3). In their Superior Court proceeding the Dunns challenge the permit denial as a taking under the Fifth Amendment to the United States Constitution and Article X of the Massachusetts Declaration of Rights. The Department also denied a wetlands variance for the same project, which the Dunns did not appeal.

a. Wetlands permit denial

The Department's Final Decision denying the project was issued on September 10, 1996. In it, the Department determined that the coastal dune at the project site was significant to storm damage prevention and flood control and that the seaward portion of the Dunn property lies within a velocity zone mapped by the Federal Emergency Management Agency (FEMA). It found that the proposed driveway and parking area would harden the dune and impede the ability of waves to remove sand from it, and in addition would destabilize the dune and generate increased erosion by removing existing vegetation, mostly mature trees and brush on the back dune, closer to a brackish pond known as Fresh Pond. It also found that waves capable of causing major damage to structures would reach the area of the Dunn property beyond the mapped velocity zone, where the proposed house, septic system and driveway would be located, and that these waves would expose components of the proposed septic system during the 100-year storm, causing the dune to erode around them. Finally, the

Department found that the exposed septic system would impede the natural movement of sediment on the dune, and that the "hardening" of the driveway and parking area would impede the landward migration of the dune toward Fresh Pond. *See Matter of Dunn*, Docket No. 89-072, Final Decision, 3 DEPR 185 (September 10, 1996).

b. Wetlands variance denial

While their adjudicatory appeal of the wetlands permit denial was pending, the Dunns had, in August, 1994, applied to the Department for a wetlands variance allowing the same project, on the ground that the permit denial resulted in an uncompensated taking of their property.[1] On February 28, 1997—after the Dunns had commenced their Superior Court appeal of the wetlands permit denial—the Department issued a decision denying the variance, in part because it was unconvinced by the Dunns' argument that there were no reasonable alternative uses of their property. In the

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[1] The variance was requested under 310 CMR 10.36, which provides in pertinent part that:

> The Commissioner may waive the application of any regulation(s) in 310 CMR 10.21 through 10.37 when he finds, after opportunity for an adjudicatory hearing, that:
>
> (1) there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 10.21 through 10.37;
>
> (2) that mitigating measures are proposed that will allow the project to be conditioned so as to contribute to the protection of the interests identified in M.G.L. c. 131, §40; and
>
> (3) that the variance is necessary to accommodate an overriding community, regional, state or national public interest; or that it is necessary to avoid an Order that so restricts the use of property as to constitute an unconstitutional taking without compensation.

Department's view, the Dunns had not analyzed sufficiently such alternatives as "the construction of a small boat house or a gazebo-like structure," or, as an alternative to a subsurface sewage disposal system, "a composting toilet or other alternative technology or a shared septic system located outside the parcel."[2]

The Department also found no sufficient showing by the Dunns that project denial so restricted the use of their property as to constitute an unconstitutional taking without compensation. Its position was, and remains, that the property available for the Dunns' use included other lots now or formerly owned by them and by Giles Dunn's ancestors, among them the lots that he sold after he inherited a 45.5 acre area at Point Connett from his mother's estate in 1985. As the Dunns had not submitted information addressing land use within this larger area, the Department found itself without the information it considered necessary to support the issuance of a variance.[3]

c. The remand order

The Dunns neither requested an adjudicatory hearing on the variance denial nor appealed it under M.G.L. c. 30A. The Superior Court remanded the matter to the Department, however, for a hearing on the Dunns' variance request and "to ascertain exactly the uses to which *the land* may lawfully be put" (emphasis added).

d. Framing the issues in this proceeding

On June 11, 1997 I issued a notice to the parties of a status conference to be held on June 25, 1997, and ordered that in advance of the status conference, the parties were (a) to confer to discuss resolution of this matter by settlement, (b) to

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[2] Decision on Request for Variance (February 28, 1997), at 6.

[3] Decision on Request for Variance (February 28, 1997), at 8.

enter into a stipulation of agreed facts, issues and witnesses, and (c) to file and serve a statement of undisputed or agreed material facts, disputed material facts, issues to be adjudicated, and their respective witnesses, together with a brief statement of the witness' qualifications and expected testimony.

The Department filed and served a statement of unresolved issues on June 19, 1997. On June 25, 1997, the Dunns filed and served a status conference statement presenting agreed facts, disputed facts, issues to be adjudicated and witnesses.

I conducted a status conference in this remand proceeding on June 25, 1997. From the discussion I had with the parties at the conference, it became clear to me that the Department and the Dunns did not agree on what area or areas comprised "the land" whose lawful uses were to be ascertained under the remand order. I determined, therefore, that the area in issue—locus—had first to be resolved.

On the same day, following the status conference, I issued an order establishing deadlines by which (a) the Dunns could file a pleading, and (b) as agreed at the conference, both parties were to file a stipulated chronology and statement of contested and uncontested facts, and a book of stipulated exhibits to which the stipulation of contested and uncontested facts referred. The order also directed the parties to appear for a further status conference on July 17, 1997.

On July 15, 1997, the parties filed a stipulation of uncontested facts and a statement of "additional facts proposed by the Department and contested by the Dunns."

I conducted a second status conference on July 17. 1997. The results of the conference, stated in greater detail in an order I issued on July 18, 1997, were: (1) the Dunns declined to file a pleading identifying claims they would be pursuing

had they appealed the Department's variance denial,[4] (2) the parties still needed to clarify the locus that was the subject of the Dunns' takings claims, (3) the Dunns agreed to file documents clarifying lot 161A's existence, and (4) both parties agreed that the following issues should first be determined by summary decision if no relevant facts were genuinely disputed:

(a) what is locus?

(b) when did the Dunns acquire title to locus? and

(c) did the Dunns acquire title to locus subject to preexisting restrictions on their ownership rights imposed by the Wetlands Protection Act and/or Regulations and, if so, what were those restrictions?

The parties also agreed to a schedule for filing motions for partial summary decision of these three issues, and for a view. The Dunns filed exhibits regarding the existence of lot 1G1A on August 5, 1997. The Department filed its motion for partial summary decision on August 22, 1997; the Dunns filed opposing papers on September 5, 1997.

e. View and oral argument

On September 12, 1997 I conducted a view with both parties present. In the course of this view I walked and observed lot 161A and the northeastern corner of lot 161B. I was also shown other areas at Point Connett including Fresh Pond, the lots to the west of lot 161A along the right-of-way, developed lots on the west side of Fresh Pond, and lot 3 along

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[4] The Dunns have asserted throughout this proceeding, however, that the variance denial, like the permit denial before it, prevents them from constructing a single residential dwelling and therefore deprives them of their property and entitles them to damages under Article X of the Massachusetts Declaration of Rights or the Fifth Amendment to the United States Constitution. *See, e.g.*, the Dunns' request for findings of fact and rulings of law (November 14, 1997).

the west side of Angelica Avenue. In addition, I was shown the view of Angelica Point (and houses rebuilt upon pilings following recent hurricane damage) across the water from Angelica Avenue.

On September 18, 1997, I heard oral argument on the Department's motion for partial summary decision. With the parties' agreement, I also established a schedule for further proceedings, including the Department's filing of its statement of uses it might allow at locus.

On October 2, 1997, the Department moved for an extension of its time to file the statement of potentially allowable uses.

On October 3, 1997, I issued an order modifying the schedule that was established following oral argument on the Department's motion for summary decision. The new schedule required the filing of the Department's statement of potentially allowable uses and prefiled testimony after I issued a decision on the Department's motion for summary decision.

f. Partial summary decision: locus, date of acquisition, preexisting use restriction imposed by M.G.L. c. 131, § 40

On October 17, 1997, I issued a partial summary decision of the three issues that were identified at the July 17, 1997 status conference [*see* above, at 7]. It included detailed findings regarding the history of the Dunn family landholdings at Point Connett, Giles Dunn's inheritance from his mother's estate in 1985 of a 45.5 acre portion of land then valued at $169,738, the Dunns' division of this land into smaller lots including locus in the late 1980s, the approval of locus as a lot by the Mattapoisett Zoning Board of Appeals, and the local planning board's endorsement of the plan for locus as one not needing approval under the subdivision control law, M.G.L. c. 41, § 81L. *Partial Summary Decision*

(October 17, 1997), at 5-10. I incorporate those findings here by reference.

The partial summary decision determined that:

(i) locus is lot 161A, a 1.106 acre lot lying between Fresh Pond and Fresh Pond Cove (Buzzards Bay) on Beach Road in Mattapoisett; however, the larger parcel inherited by Giles Dunn out of which lot 161A was ultimately created, and the disposition of its component lots, may be taken into account in considering the Dunns' reasonable investment-backed expectations for locus;

(ii) Giles Dunn acquired title to locus by deed from his mother's estate in 1985, and both applicants acquired title jointly as tenants by the entirety in 1986; and

(iii) (a) both applicant Giles Dunn and both applicants as tenants by the entirety acquired locus subject to a preexisting use restriction imposed by the Wetlands Protection Act, (b) which (with exceptions not applicable here) was that the coastal dune and barrier beach on locus could not be altered without receiving and complying with an order of conditions allowing such alteration, the issuance of which was subject to the Department's Wetlands Protection Regulations that were in effect when a notice of intent was filed for the project they propose.

g. Second partial summary decision: "uses to which the land may lawfully be put"

Per the modified schedule that I ordered on October 3, 1997, the issuance of the partial summary decision on October 17, 1997 meant that the Department's prefiled testimony and exhibits were due by November 6, 1997, the Dunns' prefiled testimony and exhibits were due to be filed and served by November 17, 1997, and prefiled rebuttal testimony, if any, was due from both parties on November 24, 1997.

On October 23, 1997, the Department filed the "Prefiled testimony of Elizabeth Kouloheras regarding options potentially approvable by the Department on lot 161A" ("the Kouloheras PFT"). The potentially approvable uses identified by the Department in the Kouloheras PFT are:

> (1) *"Nonstructural uses"*: "leisure and recreational activities, i.e., sunbathing, swimming, boating, picnicking and birdwatching," "the sale or lease of beach rights to individuals such as inland residents who have no beach access," "charg[ing] the public an access fee to use the beach for recreation," selling the parcel to abutting owners, and use of the parcel by its owners for "private recreational enjoyment";
>
> (2) *"Structural uses"*: "any uses which do not require the installation of an on-site septic system on lot 161A but might include a chemical toilet," including "beach cabanas, boat storage or other marine related uses, or an open deck and seating area which could also serve as a tent platform," and "[a] small permanent structure elevated on piles and built in accordance with the State Building Code and FEMA structural requirements for coastal high hazard areas located near the western end of the lot and forward of the mature woody vegetation," provided it was "of open-pile construction, without continuous concrete footing or slab" and "minimiz[ed] impacts to vegetation from shading and destruction"; and
>
> (3) For either structural and nonstructural uses: "a short driveway without turnaround circumference or a parking space . . . . at the western property line to minimize dune impacts," so long as it was constructed of "pervious material (i.e., crushed stone or shells) and be no larger than necessary to accommodate one vehicle."

On November 5, 1997, the Department moved to revise the schedule and for the issuance of a Final Decision in this matter by November 14, 1997, as the parties were scheduled to appear in the Superior Court on November 19, 1997.

On November 7, 1997, I conducted a telephone conference with counsel for both parties. During that conference, the parties agreed that (a) the lawful uses of lot 161A, *as a matter of zoning*,[5] are those allowed under the Town of Mattapoisett zoning bylaw, (b) the local zoning bylaw allows the potentially approvable uses listed in the Kouloheras PFT and the use proposed by the Dunns, and (c) the parties' respective preferences for or objections to any of these uses aside, the universe of uses to which lot 161A may lawfully be put, *as a matter of zoning*, consists of what the Dunns propose and the potentially approvable uses identified in the Kouloheras PFT. The parties also agreed that I could now issue a partial summary decision to this effect, thereby determining, as the Superior Court's remand order required, "the uses to which the land may lawfully be put."

On November 7, 1997, I issued a partial summary decision determining that the "uses to which the land may lawfully be put," *as a matter of zoning*, are the project proposed by the Dunns and the uses identified in the Kouloheras PFT.

h. The parties submit their respective cases

During the same telephone conference on November 7, 1997, I also discussed the need for further filings with the parties, and as a result the following schedule was ordered:

(i) The Dunns were to confirm, by November 17, 1997, that they would not be filing any new testimony in this

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[5] I use the phrase "as a matter of zoning" to distinguish these uses from those the Department argues are lawful, meaning those it might allow under the Wetlands Protection Act and excluding, consequently, the Dunns' proposed project as it is presently designed.

proceeding, and that instead their prefiled testimony would incorporate previous filings by reference, including the Dunn deposition taken in the pending Superior Court appeal, and the documents they filed in August, 1997 as to the existence of lot 161A.

(ii) The Dunns had until and including November 17, 1997 to file proposed findings and conclusions.

(iii) The Department would be filing no further testimony in this proceeding. Its prefiled testimony therefore consisted of the two sworn statements it had already filed: the Kouloheras PFT and an affidavit by Department environmental analyst Daniel Gilmore, sworn-to July 17, 1997, that was filed in support of the Department's August 22, 1997 motion for summary decision.

(iv) The Department had until and including November 17, 1997 to file proposed findings and conclusions.

(v) The parties understood that because they wanted until November 17, 1997 to file proposed findings and conclusions, a Final Decision could not be issued in this matter by the time of their next court appearance on November 19, 1997 in the Superior Court appeal. However, I told the parties that by that date they would have (a) the partial summary decision regarding lawful uses on lot 161A (which they now have), and (b) a status report, which they could present to the Court, stating what had been completed and decided thus far in this matter, the schedule for filing proposed findings and conclusions, and my commitment to complete my part of the decisionmaking in this matter by December 1, 1997, so long as the parties completed their filings by November 17, 1997.[6]

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[6] On November 10, 1997, I issued an order confirming the schedule I established during the November 7, 1997 telephone conference.

Later that day, counsel for the Dunns filed and served a letter stating that the Dunns' prefiled testimony consisted of "all of the prior testimony given by the Dunns' representatives at the time of the hearing on the request for a superseding order of conditions, (and) all of the exhibits and the transcript of the deposition of Giles H. Dunn, should be included."

As the parties did not request cross-examination, their respective cases were submitted upon the record, without the live portion of the adjudicatory hearing that is otherwise available to parties in an adjudicatory proceeding.[7]

The parties have now filed and served their proposed findings and conclusions.

Discussion

The remaining issue is whether anything in the record persuades me to recommend that the Commissioner alter his original, unappealed decision denying the Dunns a wetlands variance pursuant to 310 CMR 10.36. I focus, in particular, on whether to recommend that a variance for the Dunns' proposed project be issued "to avoid an Order that so restricts the use of property as to constitute an unconstitutional taking without compensation."

I have found nothing in the record that supports such a recommendation.

1. Score of determination

I begin by placing the wetlands variance in its proper regulatory context and by determining the proper scope of a variance determination when the takings issue has been raised.

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[7] The Department's Adjudicatory Proceeding Rules, 310 CMR 1.01, specifically allow this, *see* 310 CMR 1.0l((13)(g)(1995 rev.).

a.

The opening paragraph of 310 CMR 10.36 states that "[t]he Commissioner *may* waive the application of any regulation(s) in 310 CMR 10.21 through 10.37. . . ." (emphasis added). The allowance of a variance under 310 CMR 10.36 is thus a matter of discretion rather than right. It is also the exception rather than the rule. *See* 310 CMR 10.36, commentary ["310 CMR 10.36... .is intended to be employed only in rare and unusual cases"].

A wetlands variance may be granted, as a matter of discretion, for either of two purposes: "to accommodate an overriding community, regional, state or national public interest"—a purpose that is not at issue here—or because "it is necessary to avoid an order that so restricts the use of property as to constitute an unconstitutional taking without compensation" (the takings avoidance ground). 310 CMR 10.36(3).

Even if either of these grounds exists, however, two predicate findings must be made before a variance may be granted: "(1) there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 10.21 through 10.37," and "(2) that mitigating measures are proposed that will allow the project to be conditioned so as to contribute to protection of the interests identified in M.G.L. c. 131, §40...." 310 CMR 10.36, ¶1.[8]

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[8] The "interests identified in M.G.L. c. 131, § 40" are "public or private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, protection of land containing shellfish, protection of fisheries, and protection of wildlife habitat." 310 CMR 10.04; *see also* M.G.L. c. 131, § 40, ¶18 (formerly ¶13, prior to the statute's amendment by the Rivers Protection Act, St. 1996, c. 258, effective August 7, 1996)

These findings are mandatory. Neither of them can be waived, and no variance can be issued unless both findings are made. In determining whether to grant a variance, consequently, the emphasis is not upon the accommodation of an overriding public interest or upon avoiding an unconstitutional taking; the emphasis remains, instead, upon the protection of wetlands interests. No variance can be issued if wetlands interests cannot be protected.

Even if they could be protected, however, the Commissioner's variance determination remains purely discretionary. While the exercise of discretion to issue a variance on the takings avoidance ground is constrained by the requirement of predicate findings recited at 310 CMR 10.36, ¶1, there is no such constraint on the exercise of discretion to deny a variance. The regulation does not require, for example, that a variance be granted simply because the prerequisites for granting one are shown to exist. Nor does it require the record to show definitively that no taking has occurred before a variance on the takings avoidance ground may be denied. Finally, the regulation neither prescribes nor suggests any particular "test" or analysis to determine whether a taking has occurred.

In fact, the regulation does even not require a decision of the taking issue. Nothing in the regulation even suggests that a variance proceeding is intended to be a test drive of a future, or pending, eminent domain proceeding, or that it is intended to be an opportunity to sample the Commonwealth's defense to a regulatory takings claim. Simply put, 310 CMR 10.36 allows the granting of a variance to <u>avoid</u> a possible takings claim, not to resolve it or even to determine if there has been a taking. This is purely a subjective call, one that is constrained by a mandate to protect wetlands and wetlands interests, that is intended rarely to favor a variance, and that is

not dependent upon the proof needed to persuade courts that a taking has or has not occurred.[9]

b.

Had the Dunns requested an adjudicatory hearing on the variance denial, as the Regulations allowed them to do, *see* 310 CMR 10.36, ¶5, they would have had "the burden of demonstrating" that the project they propose "meets the criteria necessary for a variance." *Id.* "The criteria necessary for a variance" means *all* of the criteria for a variance recited at 310 CMR 10.36, ¶1—not only that a variance was necessary to avoid an unconstitutional taking, as the Dunns allege, but, more critically, that there are no reasonable conditions or alternatives that would allow the project to be permitted and that they propose mitigating measures allowing the project to be conditioned to protect wetlands interests.

c.

The Dunns did not appeal the variance decision, however. While the remand order directed the determination of a takings-related factor ("the lawful uses to which the land may be put") it did not mention the variance criteria recited at 310 CMR 10.36 or the variance appeal procedure that the rule prescribes. Nothing in the remand order suggests that this proceeding was to focus solely upon takings-related criteria. Nor, however, does the remand order suggest that an analysis of those criteria can be avoided by finding that the Dunns' project as it is presently designed cannot be conditioned to protect wetlands interests. That result, otherwise compelled

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[9] A variance may be denied, therefore, even if an applicant's case is persuasive that the project could be conditioned appropriately and that permit denial has effected, or may effect, an unconstitutional taking. A variance may thus be denied under 310 CMR 10.36 if the Commissioner determines that the need to protect the wetlands at issue and the wetland interests to which they are significant outweigh takings-related considerations.

by 310 CMR 10.36, is effectively preempted here by the remand order, since the order requires a determination of the lawful uses to which the land may be put, a criterion related to the takings issue.

In all other respects, the remand order left intact the variance analysis contemplated by 310 CMR 10.36, even though no adjudicatory appeal invoked it directly.

The scope of this determination is therefore:

(a) as required by the remand order, the lawful uses to which the land may be put;

(b) the two predicate findings that, per 310 CMR 10.36, ¶ 1, must be made before a variance may be granted for the project at issue here: (i) are there "reasonable conditions or alternatives" to the project proposed by the Dunns that would allow the project to comply with 310 CMR 10.28, and (ii) can the project be conditioned so as to contribute to protection of the interests identified in M.G.L. c. 131, § 40; and

(c) within the decisional framework discussed above [at 14-16], whether a variance should be granted because it is necessary to avoid an unconstitutional taking.

2. *Variance analysis*

a. *"Uses to which the land may lawfully be put"*

The "uses to which the land may lawfully be put," meaning the uses allowed *by zoning law* on lot 161A, has already been determined [*see* above, at 10-11]

b. Predicate findings under 310 CMR 10.36

i.

The Dunns have not come forward in this proceeding with any evidence regarding conditioning or project alternatives that would allow the project to proceed in compliance with

310 CMR 10.28 and make a variance of its requirements unnecessary. In their view, there are no alternatives other than to elevate the proposed dwelling by "a few feet."[10] The Dunns assert that they have proposed "a minimal economic use of the land with as low an environmental impact as possible."'[11] In their view, the only practical use of the property is the project they propose-an elevated dwelling with a driveway and a subsurface sewage disposal system. It is also their position that building an elevated structure with no subsurface sewage disposal system, or putting the property to a use that did not require a subsurface sewage disposal system, is unacceptable.[12]

The Department has identified a number of structural and nonstructural alternative uses for lot 161A [see above, at 10-11], including an elevated structure with a chemical toilet—basically, a subset of "the lawful uses to which the land may be put" consisting of those uses lawful under zoning law that might also be approved under the Wetlands Protection Act and Regulations, with appropriate conditions. The Dunns have come forward with no evidence that these uses are not reasonable. They have argued, instead, that the only acceptable use of lot 161A is the construction of a residential structure on pilings with a subsurface sewage disposal system, and that denial of this use deprives them of their property. The argument is not sufficient to show that there are no reasonable project conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 10.28.

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[10] Request for a variance (August 16, 1994), at 1.

[11] *Id.*

[12] *Id.*

ii.

Since the first predicate criterion for a variance under 310 CMR 10.36 has not been met, it is not necessary to address the second predicate criterion. I note, nonetheless, that the record lacks evidence of "mitigating measures . . . . that will allow the project to be conditioned so as to contribute to the protection of" relevant wetlands interests.

The project plans have not changed since the Department found, in the Final Decision denying a wetlands permit, that the project would destabilize a coastal dune, promote its erosion, impede its natural movement and migration, and undermine the dune's storm damage prevention and flood control functions [see above, at 3; Final Decision (September 10, 1996), at 20, 24-25, 31 and 33, 3 DEPR at 190-92]. On the basis of these findings, the Department concluded in the Final Decision that the project would not meet the performance standards for coastal dunes recited at 310 CMR 10.28. The findings would remain established even if the performance standards were waived under 310 CMR 10.36. It was the Dunns' burden, consequently, to propose measures in mitigation of the adverse wetlands impacts found by the Final Decision and to show that those mitigating measures would contribute to the protection of storm damage prevention and flood control.

The Dunns' variance request proposes elevating the dwelling "a few feet higher," and either armoring the subsurface sewage disposal system to protect it from exposure during storms, or placing the system in the dwelling rather than below ground, above the 100-year flood elevation. They filed no new testimony regarding the adequacy of these mitigating measures, however. The Dunns have instead incorporated by reference the testimony they presented during the adjudicatory hearing on the wetlands permit application.

That is not enough to satisfy the mitigating measures criterion for a wetlands variance. The Dunns' permit hearing testimony addressed the project's ability to meet the performance standards of 310 CMR 10.28, rather than the sufficiency of mitigating measures to contribute to the protection of storm damage prevention and flood control, the relevant variance criterion. It is conceivable that mitigating measures insufficient to meet performance standards could be shown to meet the standard enunciated at 310 CMR 10.36 if the applicable performance standards were to be waived.

Nonetheless, the showing must be made affirmatively. At a minimum, the Dunns needed to show that the testimony rejected in the Final Decision on the issue of project compliance with coastal dune performance standards nonetheless shows that the mitigating measures identified in the variance request allow the project to be conditioned to contribute to the protection of storm damage prevention and flood control. Its sufficiency in this regard is not otherwise self-evident. In addition to concluding that the performance standards of 310 CMR 10.28 were not met, the Final Decision recited specific findings that the project would adversely affect the coastal dune and its storm damage prevention and flood control functions, rejecting, consequently, the contrary proposition propounded in the Dunns' permit hearing testimony. A reference back to that testimony therefore does nothing more than reargue a proposition, rejected in the Final Decision, that the project's design assured no adverse impacts on the coastal dune or the wetlands interests to which it is significant.[13]

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[13] Another proposition underlying the Dunns' permit hearing testimony—that the area in question was not significant to storm damage prevention and flood control—was also rejected in the Final Decision (at 14-18; 3 DEPR at 188-189).

c. Variance to avoid a taking

To determine the issue in the variance context, I need go only as far as to find no evidence in the record that the wetlands permit denial has interfered with reasonable investment-backed expectations, one leg of the regulatory takings analysis that was employed in *Leonard v. Town of Brimfield*, 423 Mass. 152, 666 N.E.2d 1300, 1302-03 (1996). Having so found, I conclude that a variance is not necessary to "avoid an Order that so restricts the use of property as to constitute an unconstitutional taking without compensation."

Leonard instructs that "[a] property owner's investment-backed expectations must be reasonable and predicated on existing conditions.... It must be more than a "unilateral expectation or an abstract need" (citation omitted). 666 N.E.2d at 1303. It was held in *Leonard* that the owner could not have had a reasonable investment-backed expectation that she could subdivide her flood plain property because she purchased it subject to a local zoning bylaw that required a special permit for development in a flood plain and because, at the time of purchase, the property was in a designated flood plain.

I have already determined that Giles Dunn, and afterward the Dunns as tenants by the entirety, acquired lot 161A subject to the Wetlands Protection Act's permitting requirements. *Partial Summary Decision* (October 17, 1997), at 44. The Act does not specifically prohibit the project that the Dunns propose; neither do the Wetlands Protection Regulations, although 310 CMR 10.28, which was also in effect when the Dunns acquired lot 161A, does prohibit adverse impacts upon coastal dunes. That left open the *possibility* that a project on lot 161A could be conditioned adequately to protect wetlands interests, and therefore *might* be allowed.

Consequently, the Dunns' acquisition of lot 161A subject to the Act did not preclude them outright from asserting that

the wetlands permit denial interfered with their investment-backed expectations for the property. *Partial Summary Decision* (October 17, 1997), at 44. That is not enough, however, to show that the Dunns acquired an absolute right to construct the project they propose when they acquired lot 161A. Their only reasonable expectation was the possibility of obtaining a permit; they were also on notice from the time they acquired lot 161A, however, that a permit might be denied, and that denial was a certainty if a project they proposed could not be conditioned to protect relevant wetlands interests.

For this reason, I am not persuaded that the permit denial alone, with no other proof of interference with reasonable investment-backed expectations, shows a taking of lot 161A that only a variance can avoid.

The record contains no other proof of interference with reasonable investment-backed expectations. The Dunns were afforded an ample opportunity in this proceeding to come forward with such proof. The October 3, 1997 scheduling order, for example, allowed all of the parties to file prefiled testimony and exhibits [*see* above, at 8-9]. The Dunns elected, however, to rely on material already in the record, including the testimony they presented during the wetlands permit proceeding and a copy of the deposition of Giles H. Dunn that was taken on April 11, 1997 in the pending Superior Court proceeding. They have not filed any testimony addressing the matter of reasonable investment-backed expectations; nor have the Dunns directed my attention to any evidence in the record showing that the wetlands permit denial interfered with their reasonable investment-backed expectations.

I have searched the record for such evidence nonetheless. What I have found on point is this: in May, 1988 the Dunns divided lot 161 to create lot 161A, for which they had two potential purchasers (William J. Sweeney and Leslie

Sweeney), but a closing was contingent upon the receipt from the Department of a wetlands permit for the project proposed here.[14] Giles Dunn's court deposition testimony was to the effect that the wetlands permit denial cost him the sale to the Sweeneys.[15]

What this shows is, at best, the frustration of a unilateral expectation or—more likely—the frustration of a hope. The sale in question was contingent upon receipt of a wetlands permit for the project at issue here. The contingency shows that the Dunns and the prospective purchasers of lot 161A knew that permit issuance was not certain, and that as a consequence neither was the proposed project, or a sale of the lot based upon the purchaser's ability to construct the proposed project on it, certain. There was thus no reasonable investment-backed expectation that the sale would occur.

Recommendation

In view of the foregoing findings and conclusions, it is my recommendation to the Commissioner that the variance denial be sustained with respect to the proposed project as it is presently designed.

/s/ Mark L. Silverstein
MARK L. SILVERSTEIN
Administrative Law Judge

As the Department's final decision in this remand proceeding, I accept in part the recommendation of the Administrative Law Judge and hereby sustain denial of the Dunns' variance request. I do so without adopting all of the

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[14] See the Dunns' "Statement as to the existence of lot 161A," a collection of documents they filed in this proceeding on August 5, 1997 that includes correspondence regarding the proposed sale of lot 161A to the Sweeneys.

[15] *See* transcript of deposition of Giles H. Dunn taken April 11, 1997, vol. I, at 37, 87-88, 94, 138-39.

ALJ's reasoning. Instead, based upon my review of the record, I conclude that the Dunns have not come forward with evidence sufficient to meet any of the pertinent standards for a variance that are set forth at 310 CMR 10.36.

In particular, despite multiple opportunities and despite the identification in this proceeding of permittable alternatives, the Dunns have not entertained any reasonable alternatives that either would meet the applicable performance standards or will contribute to protection of the relevant wetlands interests.

Instead, the Dunns have only pursued a proposal that the Department has found will cause unacceptable impacts on those interests, especially because much of the site is located in a coastal velocity zone. Indeed, the evidence demonstrates that the Dunns created their own hardship by systematically subdividing a. substantially larger parcel until the remaining lot, the subject lot 161A, was placed entirely within areas that were and are subject to constraints under the Wetlands Protection Act.

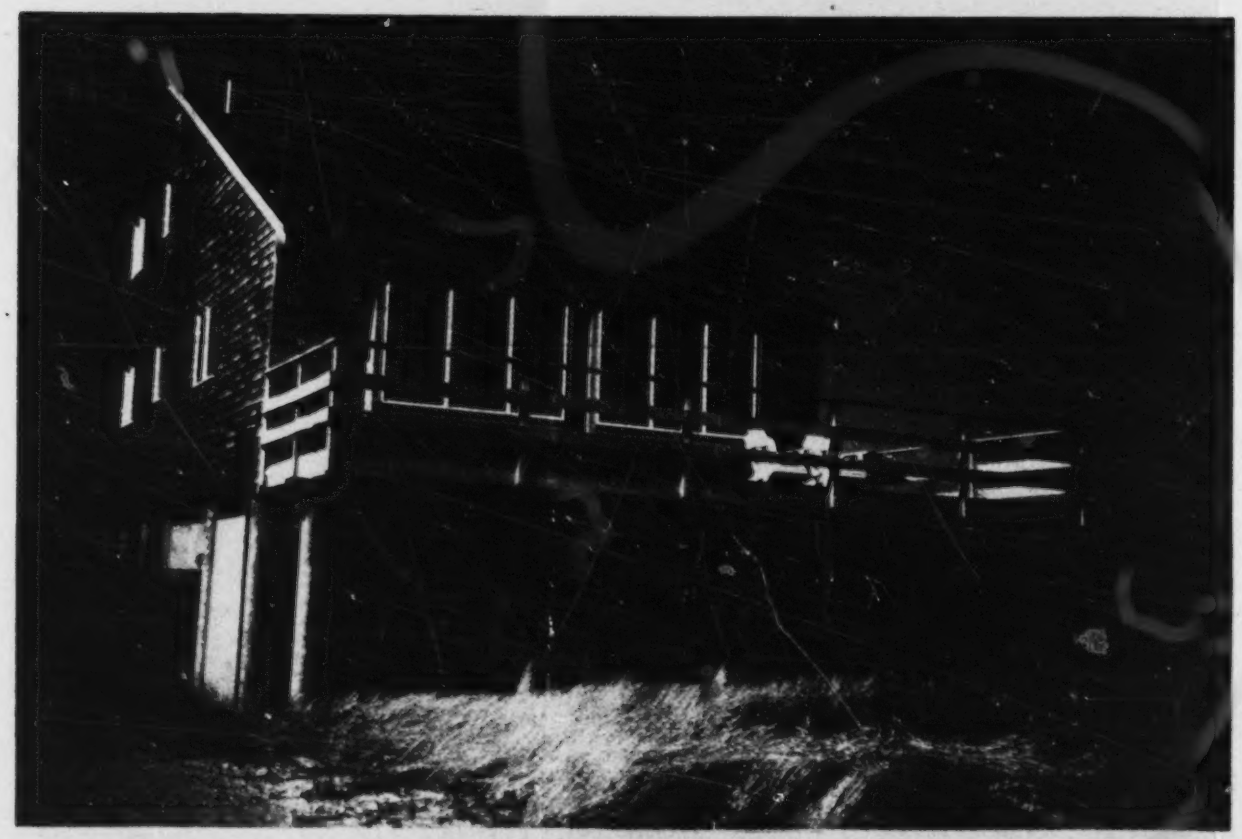
I decline to exercise my discretion as Commissioner of the Department to grant a variance in these circumstances.

/s/ David B. Struhs
DAVID B. STRUHS
Commissioner

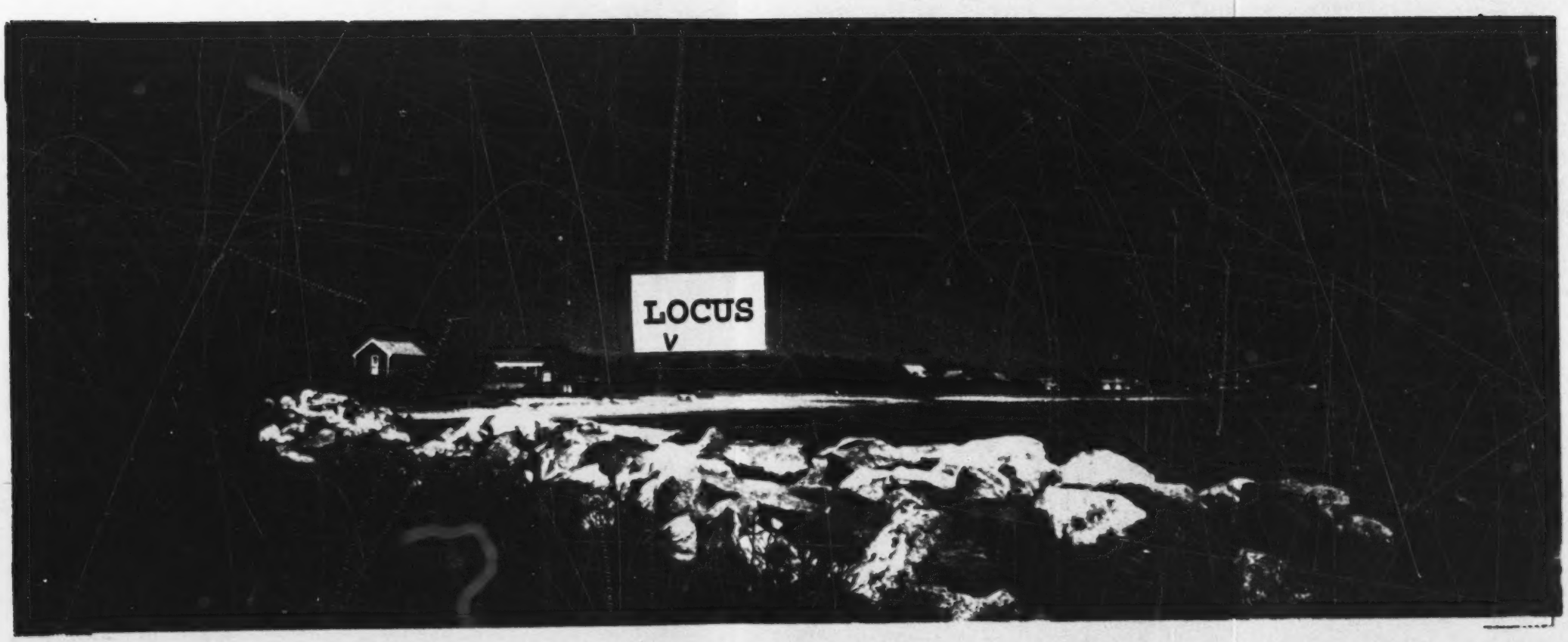
The General Laws of Massachusetts, c. 231A, § 1 provides:

> The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issued which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with proper instructions by the court, whether a general verdict be required or not.

TYPICAL HOUSES ON ANGELICA BEACH



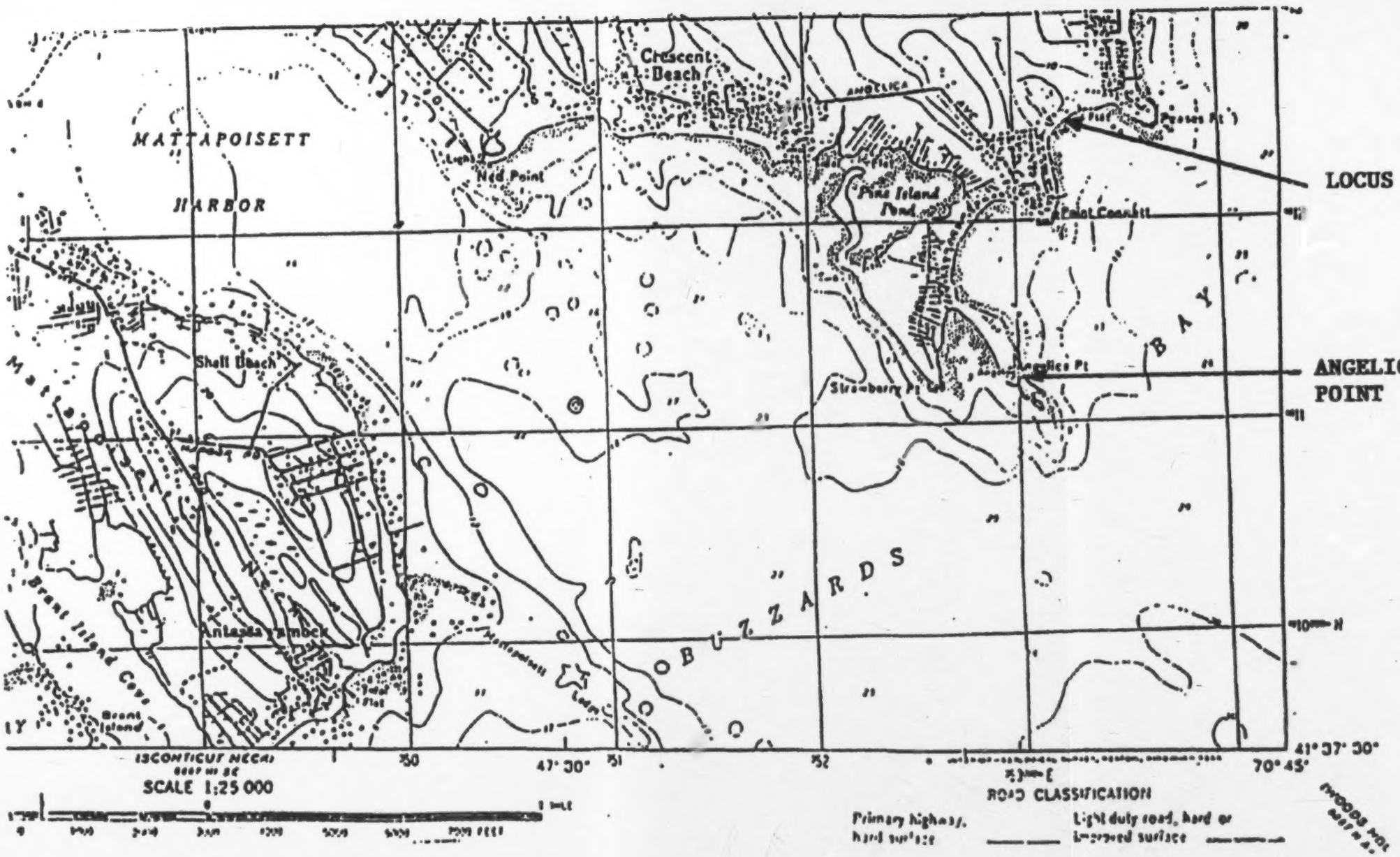
SWEENEY'S HOUSE



APPROACHING LOCUS

VIEW FROM BEACH

LEFT TO RIGHT - DUNN'S HOUSE, SWEENEY'S HOUSE



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